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IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON, EMILY ELIZABETH STEPHENSON, JOE ISAACSON, and PHYLLIS LISA ISAACSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

Respondents Joe Isaacson and Daniel Stephenson served in Vietnam, where they were exposed to "Agent Orange."[1] Isaacson volunteered for the Air Force, serving as a crewman at one of the airfields that supported Operation Ranch Hand, the code name for the "Agent Orange" missions. (JA at 291.)[2] Stephenson, a helicopter pilot, was exposed to "Agent Orange" both at his base and in-country on the ground. (JA at 254.) In 1996 Isaacson was diagnosed with non-Hodgkin's lymphoma and in 1998 Stephenson was diagnosed with multiple myeloma. Both diseases are rare, deadly cancers which have been related to "Agent Orange" exposure. (JA at 319-325.)

Respondents filed timely state law claims against Petitioners, who manufactured the chemicals which caused their cancers. Petitioners moved to dismiss these claims on the basis of *res judicata*, asserting that they had been settled years before Respondents' cancers were diagnosed. They assert this settlement as a complete bar, even though it entitled Respondents to no compensation at its inception, no eligibility for compensation while it was being administered, and no potential for compensation after Respondents were diagnosed with their cancers.

After the war ended, Respondents were fortunate to return to civilian life in good health. Although some other Vietnam veterans claimed injuries related to their exposure to Agent Orange, neither Stephenson, who became a civilian helicopter

1. "Agent Orange" is generally used to describe a variety of phenoxy herbicides used in Vietnam. Many of these were contaminated with the known human carcinogen, 2,3,7,8-TCDD (dioxin).

2. The Joint Appendix will be referred to as "JA," Petitioner's Petition for Writ of Certiorari will be referred to as "PFC," Respondent's "Opposition to the Petition for Certiorari" will be referred to as "ROC," Petitioner's Brief on the merits as "PB," and this Brief as "RB."

pilot, nor Isaacson, now a vice-principal, had any reason to do so. (JA at 243, 291.) In 1978, when injured veterans first brought lawsuits for those injuries they believed were due to "Agent Orange," Respondents similarly had no reason to pay attention to the MDL 381 proceedings in the U.S. District Court for the Eastern District of New York.

A. MDL 381 Class Certification, Notice and Opt-Out Period

The original Agent Orange proceedings were "preliminarily" certified as a class action by Judge Pratt in 1980. *In Re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 787 (E.D.N.Y.). This certification was not, as Petitioners' claim, "understood to include both ill and asymptomatic veterans," PB at 4, as Judge Pratt identified the class as "persons **who claim injury** from exposure to Agent Orange."[3] *Id.* at 788 (emphasis added). This provisional class had no identified representatives nor was there any analysis of the proposed

3. While those claiming injuries would necessarily come from the entire exposed population, Judge Pratt never stated that class members would include "asymptomatic" veterans or " veterans who had not manifested injury." Petitioners contend that, at the time of Judge Pratt's order, they "understood" that "asymptomatic" veterans were part of the certified class, PB at 4, but what Petitioners may have believed is irrelevant. As to Yannacone's argument, Petitioners themselves: (1) asserted that if plaintiffs believed the class included claims for "people that are not sick * * * [that is not a] claim upon which relief can be based;" (JA at 60.); and (2) took the "position that at risk claimants don't have a cause of action so they can't be in anything." (JA at 69). PB at n.1, citing JA at 70, misinterprets the text, as the "potential claimants" being discussed there were those with injuries who had not filed claims or lawsuits. Petitioners' quoted line at JA at 70 (PB at n.1) is followed by: "[P]laintiffs submit that the class include those whose **injuries** fall within particular Agent Orange profiles." (emphasis supplied). Significantly, Petitioners cannot point to anything in the Rule 23(c)(2) notice materials that would have alerted a typical reader that the class included veterans who had been exposed but were not yet sick.

qualifications of representatives. Judge Pratt merely stated that "the court ***will select*** from among the hundreds of plaintiffs representative persons * * * who will fairly and adequately protect the interest of the class." *Id.* (emphasis added).

When the class was finally certified by Judge Weinstein, he also found the "representatives" to be adequate, even though they were still unidentified,[4] (JA at 78-80.) relying on Judge Pratt's findings: "[t]he four prerequisites of Rule 23(a) as they apply to this litigation have already been carefully analyzed by the court and found to exist." *In re Agent Orange*, 100 F.R.D. 718, 721 (E.D.N.Y. 1983), citing 506 F. Supp. at 787. Judge Weinstein then defined the class as:

> [T]hose persons who were in the United States, New Zealand or Australian armed forces at any time from 1961 to 1972 **who were injured** while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides. . . . 100 F.R.D. 729 (emphasis added).

This class did not include "at risk," "asymptomatic," or "future" veterans (hereafter "future"). If it did, the class would have simply been defined as: "Those persons who were in the United States . . . armed forces at any time from 1961 to 1972 in or near Vietnam **who were exposed** to Agent Orange or . . ." In any case,

4. Judge Weinstein approved the class certification at a hearing which was held on December 12, 1983. (JA at 87). Mr. Gordon, counsel for Petitioner Diamond Shamrock, argued that Judge Pratt had indicated that a complaint with representative plaintiffs would be filed, that no such complaint was yet filed, and that there must be a representative plaintiff for each injury. Yet, none of the proposed representatives on a list first provided in the middle of that hearing had what could be called "relatively modest claims," much less "future" claims, and the court did "not know the profile of these people" in order to evaluate their suitability as class representatives. Nevertheless, the court certified the class. (JA at 79-83, 87.)

neither Respondents nor any other "future" claimant could have suspected that they were included in the "injured" class as noticed.[5]

In addition to certain mailed notices, the court ordered published and broadcast notice of class certification with an opportunity to opt-out by May 1, 1984. *See* 100 F.R.D. at 731-732.[6] This notice, sent pursuant to Rule 23(c)(2), was addressed only to a class of persons "who claim injury" from their exposure to Agent Orange. *See id.*

B. The Settlement, The Settlement Class and Fairness Hearings

Six days after the opt out deadline expired on May 7, 1984, Petitioners and class counsel reached a settlement of the class action. All of the representatives, who by that time had been designated, claimed significant present injuries resulting from "Agent Orange." (JA at 80, 127, 129.); P. Schuck, *Agent Orange on Trial* (1987) at 139-140.[7]

5. Far from understanding that *all* veterans who served in Vietnam would be part of the class, counsel for Petitioner Diamond Shamrock recognized that "half will not be a part of the class at all."(JA at 81.) Petitioners' counsel were most concerned that the notice to persons "claiming injury" was too subjective to bind absent class members to an adverse judgment. (JA at 84-85.) They would have had no such concern if the class was meant to include all veterans exposed in Vietnam.

6. This Rule 23(c)(2) notice was actually sent out on March 9, 1984, 597 F. Supp. at 756, less than two months before the opt out deadline. The dissemination of the notice ran into innumerable problems. For instance, 57,096 mailed notices were returned as undeliverable with no follow up. The myriad problems encountered in giving out the notice are described in JA at 171-182.

7. The Seventh Amended Complaint, filed on Feb. 17, 1984 (Docket entry #1864), was the active pleading at the time of the settlement, and it defined the class as those "who claim injury." Para. 25.It identified six representative plaintiff veterans, each of whom claimed "severe and permanent disabling injuries, diseases, physical disorders and disfigurement, and in some cases, death." *Id.* Para.39.

As part of the settlement, Petitioners agreed to pay $180 million dollars to the class. The new class representatives agreed not only to release "present claims" but also all claims of "future" veterans, i.e. those who had "not yet manifested injury" related to Agent Orange.[8] Class representatives agreed that no new 23(c)(2) opt out notice need be given to "future" plaintiffs, and that, instead, "the class definition would be interpreted to include service people whose injuries had not yet been manifested." P. Schuck, at 165; (JA at 88, 96.) The class representatives did not even demand that class members be informed of the terms of any distribution plan before the settlement was given final approval.

As a result, the court approved a notice pursuant to Rule 23(e) which included no right to opt out of the settlement and no information about what absent class members might recover under the settlement. The Rule 23(e) notice instructed veterans in bold letters that: "THE ONLY QUESTION TO BE DECIDED AT THIS TIME IS WHETHER THIS SETTLEMENT AS A WHOLE IS FAIR, REASONABLE AND ADEQUATE." (JA at 109.) (All caps in original).

Unlike the Rule 23(c)(2) notice mailed out after the certification, this 23(e) notice was neither broadcast nor televised. *In Re Agent Orange*, 597 F. Supp. 740, 763 (E.D.N.Y. 1984). It did not call attention to the fact that the settlement class now included "future" veterans who did not claim injuries.

8. Petitioners insisted on including "futures," as it was obviously in their interest to include as many people as possible in the lump sum settlement. Dow's counsel wanted to include civilians sent to Vietnam, Vietnamese civilians, and even children who had not yet been born into the lump sum settlement. Petitioners opposed any renewed opt out right. Petitioners also extracted an agreement which allowed them to walk away from the settlement if too many veterans had previously opted out. No veteran was afforded either a similar walk away provision or a "back-end" opt out right. P. Schuck, *Agent Orange on Trial*, 153-154 (1987); (JA at 96.)

Rather, the bold introductory header of the notice advised the reader only of: "WHAT YOU MUST DO NOW IF YOU BELIEVE YOU HAVE A CLAIM FOR ADVERSE HEALTH EFFECTS." (JA at 106.) Paragraph 1 of the notice then repeated that the court had previously certified a plaintiff class consisting of persons "who were injured while in or near Vietnam by exposure to Agent Orange" and that persons who did not opt out before May 1, 1984, were members of the class for purposes of the settlement if they fit within the above class definition. 597 F. Supp. at 867; (JA at 106-07.) Buried inside was the statement that "the settlement agreement confirmed that the class includes persons who had not yet manifested injury." (JA at 108.) The notice never specified in any way what, if anything, those individuals who had "not yet manifested injury" would receive nor even what that phrase meant.

This Rule 23(e) settlement notice did not inform absent class members that none of the class representatives fit into the subclass of veterans who had "not yet manifested injury," nor was a new class representative appointed who did. (JA at 108.) *Id.* The Court also refused to appoint separate counsel for "future" claimants, stating that this would only serve to "increase the amount of legal fees" which would be deducted from the overall cash settlement.[9] (JA at 129-130.)

While the Petitioners were aware of the conflicts created within the class, they never offered to pay for any counsel, trustee, or guardian, nor did they insist that the "future" claimants have a subclass with any type of separate representation. As a result, "future" claimants had no one protecting their interests. *See In Re Agent Orange*, 996 F.2d 1425, 1437 (2d Cir. 1993).

9. The Court also never ordered a Rule 23(d)(2) notice, which would have given "the opportunity [to] members to signify whether they consider the representation fair and adequate." The 23(e) class settlement notice never told absent class members that they could challenge the adequacy of the class representatives or the sufficiency of the notice. Moreover, the court rejected a motion to certify a subclass of objectors to the settlement. 597 F. Supp. at 757.

Judge Weinstein gave preliminary approval to the Settlement Agreement on January 7, 1985, 597 F. Supp. at 857-58, (reaffirming that decision on June 18, 1985, and issuing a final order of dismissal on July 9, 1985 in *Ryan v. Dow*, 618 F. Supp. 623, 624-25 (E.D.N.Y.). In doing so, Judge Weinstein never discussed: (1) whether presently injured class representatives and their attorneys could adequately represent "future" plaintiffs; (2) whether those representatives and their counsel had adequately represented the subclass of "future" plaintiffs when, after the opt-out period had terminated, they agreed to reinterpret a class defined as "injured" to include "persons who have not yet manifested injury;" (3) whether the notice of class certification, which defined the class as "claiming injury," provided notice to Vietnam veterans who themselves had never "claimed injury;"[10] (4) whether there was any actual or potential conflict between present and future claimants in attempting to divide the $180 million fund; or (5) whether the representative plaintiffs and their attorneys could serve as adequate representatives for "future" claimants in light of these conflicts.[11] Instead, Judge

10. Petitioners have included in the JA written objections from one plaintiff's attorney (who was not a class counsel). Although this attorney did raise some of the issues delineated above, the court and Petitioners noted that all of *his* clients had present injuries and had received the 23(c)(2) notice from the attorney himself (who had then advised them to opt-out of the pre-settlement class). (JA at 189-191.) Moreover, he was himself a subject of motions to disqualify, because while opposing the class settlement, he was seeking attorney's fees out of its proceeds. (JA at 183-185.) Additionally, in representing present claimants, his interest was to ensure that "future" claims did not deplete the recovery available to them for their "present" injuries. (JA at 144-145.) The court's denial of this attorney's motions, without any comment, leaves unanswered the question of whether the court reached the merits of his objections or decided that the attorney lacked the standing to raise objections for "futures" not shared by his clients.

11. The vast majority of veterans who appeared at the confirmation hearings objected to the settlement. However, the Court concluded that: "The strong opposition of a considerable number of sincere and well-

(Cont'd)

Weinstein's entire discussion of adequacy of representation was devoted to whether class counsel had adequately communicated with the class. 597 F. Supp. at 759.

C. The Distribution Order and Its Treatment of "Futures"

The distribution order, including the veteran payment program, was issued on May 28, 1985, and drew sharp distinctions between "present" and "future" claimants. (JA at 266, 272-273.) Claimants were to receive cash compensation for all **existing** disabilities, which had lasted for at least one year, as well as death, with payments retroactive to 1970. The amount of compensation singularly depended on the duration of time the disability existed. Veterans could receive payments for disabilities based upon each year they were disabled between 1970 and 1994; as such, the earlier someone got sick, the more money the veteran was eligible to receive.[12] *In re Agent Orange*, 611 F. Supp. 1396, 1419-20 (E.D.N.Y.). This provision benefitted "present" claimants.[13] (JA at 275-278; PB at 10.)

(Cont'd)
motivated members of the class cannot, under these circumstances, be decisive." 597 F. Supp. at 763.

12. The 1994 termination date was also inconsistent with the 23(e) settlement notice which had stated:

> [I]n order to assure that the Fund will not be exhausted before all potential claims for unmanifested adverse health effects are processed, it may prove necessary to adjust the compensation for presently manifested health effects so that funds are available for class members who may manifest compensable effects in the future. 597 F. Supp. at 870

13. There was no compensation allotted for veterans who became totally disabled or died before the age of 60, a limitation which also disproportionately reduced payments to " futures", as fewer Vietnam veterans would have reached the age of 60 by 1984. (JA at 275, 283.)

Although Judge Weinstein had stated during the fairness hearings that "if they have a manifestation in the future, they are entitled to some compensation," (JA at 129), the plan called for persons who became disabled on or after January 1, 1995 to receive nothing. 611 F. Supp at 1417. Finally, the plan included the provision of a $10 million indemnity fund which was to be kept in reserve until May 7, 2008 to reimburse Petitioners in the event of judgments in state court actions. *See id.* at 1437.

No effort was made to tie compensation to any future injuries that the scientific literature might find to be caused by Agent Orange, even though, as of 1984, phenoxy herbicide exposure was a suspected cause of a group of illnesses, including non-Hodgkin's lymphoma. (JA at 137-144 and Affidavit of Laura Welch, JA 294-299) Furthermore, the existence of a latency period of well in excess of twenty years between the time of exposure and the manifestation of cancer was well known. The district court recognized that it was "of course, possible that in a few years a sudden increase in diseases associated with Agent Orange will be revealed," 597 F. Supp. at 795, noting that "[i]t took almost forty years for solid tissue cancers to develop in victims of atomic bombing in Japan." *Id.* Yet, at the time of the settlement, the earliest exposed veterans were only 22 years post-exposure, while the most recently exposed veterans were a mere 13 years post-exposure. *Id.* at 783. (JA at 294-299.)

Further, the court recognized that numerous studies on these herbicides were being conducted, but had not been concluded: "Courts cannot, unfortunately, wait indefinitely until all scientists have completed their long term studies. They must decide on the information now available." 597 F. Supp. at 782. Realizing this potential, the court never explained why "futures" with unaccrued claims couldn't wait until these studies were completed but rather needed to settle while their claims were immature.

The plan's failure to provide a mechanism to adjust the compensation for "future" claimants in light of evolving science was inconsistent with the Court's 23(e) class settlement notice. This had promised that: "The designated kinds of adverse health effects entitled to compensation under the Fund may be modified periodically, based upon various scientific studies, some of which are now in progress." 597 F. Supp. at 870.

The court's distribution order was neither noticed by publication nor broadcast to the class. Instead, the court used a network of veterans' organizations to get the word out, as well as sending first class mailed notice to veterans who had already filed claims. *See* 611 F. Supp. at 1445-46. Neither Stephenson nor Isaacson was a member of any of these veterans' organizations at the time. (JA at 291.)

D. Rulings of the Second Circuit

In affirming the class judgment, the Court of Appeals acknowledged the diversity of interest among those with "strong claims" and those with "weak claims" but concluded that the "use of the class action was appropriate, although many potential difficulties were avoided only because all plaintiffs had very weak cases on causation." *In re Agent Orange*, 818 F.2d 145, 165-66 (2d Cir. 1987). Although Petitioners argue the concept of fairness to the class as a whole and the reasons class representatives and "present" claimants might have wanted to settle "for nuisance" value, (PB at 12, citing 818 F.2d at 171),[14]

14. The other basis cited by Petitioners for the "weakness" of the case is the strength of their government contractor defense. (PB at 3). However, Judge Pratt denied Petitioners' summary judgment motion on the defense, 506 F. Supp. at 795-96, so there was no ruling as to this fact-laden issue binding the class. While Judge Weinstein granted summary judgment as to individual plaintiffs, after this Court's decision *in Boyle v. United Technologies Corp.*, 487 US 500 (1988) Judge Weinstein reevaluated his position and ruled that government control over Agent Orange production was insufficient to warrant removal under 28 U.S.C. § 1442(1). *Ryan v. Dow Chemical Co.* 781 F. Supp. 934, 951 (E.D.N.Y. 1992).

neither the Second Circuit nor Petitioners ever explain why "future" claimants would want to settle their unripe claims for "nuisance value" (or nothing) when they, unlike "present" claimants, could wait for the completion of studies being done.

The Second Circuit also addressed the issue of adequacy of representation when it struck down a fee-sharing agreement, first disclosed four months after the settlement, which gave "investor" firms who advanced $200,000 in litigation expenses a $600,000 return after only five months. The court observed that: "[A]s soon as an offer of settlement to cover the promised return on investment is made, the investor attorney will be disinclined to undertake the risks associated with continuing with the litigation." In this case, "the conflict was especially egregious," as "six of the nine" Plaintiffs' Management Committee members were investors in the case. 818 F.2d at 224; *see also* JA at 152-153.

The Second Circuit never addressed the question of whether presently injured claimants could represent future claimants or whether anyone could adequately represent future claimants whose disabilities would accrue after the fund expired in 1994.[15] *See, e.g.*, 818 F.2d at 167.

The distribution scheme was remanded to Judge Weinstein, who modified it to comply with the Second Circuit's opinion[16]

15. The Second Circuit's opinion on the challenges to Judge Weinstein's distribution plan does not refer to any objection that the distribution plan provides no compensation whatsoever for disabilities occurring after 1994. *See* 818 F.2d at 179. To support their claim that this issue was addressed on the merits in this appeal Petitioners purport to quote from "Reply Br.of Appellants 16" on page 11 of their brief. Respondents could not locate the quoted language. (JA at 196.)

16. One of the modifications required was to the Class Assistance Program. Despite persistent unsupported representations by both Petitioners (PB at 15, 17, 36) and their *amici*, there is no evidence in the record that any of these funds benefitted Respondents in any way.

but otherwise left intact the payment plan, which provided no benefits for injuries manifesting after 1994. *In Re Agent Orange*, 689 F. Supp. 1250 (E.D.N.Y. 1988). Neither the class representatives nor their attorneys appealed this order, which became final on July 5, 1988.[17]

E. The Ivy/Hartman Cases

In 1989, a few veterans diagnosed with cancer after the *Agent Orange* settlement was consummated filed actions. Their cases were dismissed by Judge Weinstein and affirmed by the Second Circuit on the basis that the Ivy/Hartman plaintiffs, "like all class members who suffered death or disability before the end of 1994, are eligible for compensation from the Agent Orange payment fund." *In Re Agent Orange (Ivy/Hartman)*, 996 F.2d 1425 at 1435-1436 (2d Cir. 1993) (quoting *In Re Agent Orange*, 781 F. Supp. 902, 919 (E.D.N.Y. 1991). While the issue of post-1994 "future" claimants was not before the court and never addressed explicitly, implicit in the court's reasoning was that it might not hold the same way when presented with a case of a post-1994 injured veteran who was receiving nothing.

F. The Depletion of the Ten Million Dollar Indemnity Fund

In the years between 1989 and the termination of the fund in 1994, the state of the science connecting "Agent Orange" to

17. Petitioners attempt to distance themselves from the entirety of the distribution process, however at all times they were aware that they had a shared responsibility to the class, as is demonstrated by Dow Counsel's exchange with Special Master Schreiber:

> SPECIAL MASTER [SCHREIBER]: No. Mr. Rivkin, remember, it is a class action. It is the responsibility of all parties to the case, plaintiffs, defendants, the Judge, the Master, to determine what is appropriate and legal and (sic) fair way of handling a class
>
> MR. RIVKIN: I accept that. (JA at 57.)

specific diseases matured. By 1994, there was little question that exposure to herbicides in Vietnam was related to several types of cancer, including non-Hodgkin's lymphoma and multiple myeloma.[18] A blue-ribbon panel of the National Academy of Sciences' Institute of Medicine reported in 1994 that: "Evidence is sufficient to conclude that there is a positive association between exposure to herbicides (2, 4-D, 2, 4, 5-T . . .) and non-Hodgkin's lymphoma." (JA at 319-322). Despite this finding, class representatives did not move to modify the court's compensation scheme, even though the Rule 23(e) class settlement notice had promised to do so. 597 F. Supp. 869.

The class representatives' indifference to "future" victims was demonstrated again in 1994 when Petitioner Dow Chemical Company moved to transfer the $10 million reserve fund for indemnification, along with accrued interest, to the Class Assistance Program after only 12 years. (JA at 287.) The district court had stated that the ten million dollar reserve fund "will be available to compensate injured Vietnam veterans exposed to Agent Orange should future evidence indicate a legally cognizable link between Agent Orange exposure and specific ailments." *In Re Agent Orange*, 689 F. Supp. 1250, 1259 (E.D.N.Y.) Because this fund was originally ordered to remain in reserve for 25 years, 597 F. Supp. at 864 ¶4, it was incumbent upon Petitioners, the Court, and the class representatives to make sure the fund was used for this stated purpose, as well as the plight of post-1994 uncompensated "future" claimants. In spite of that obvious obligation, neither the class representatives nor their counsel objected to Petitioners' motion. (JA at 287-289.) Nor did anyone appeal. Notice of Dow's motion to transfer the funds was not disseminated, so no absent class members,

18. For instance, scientific knowledge was sufficient by 1991 that the Department of Veterans Affairs determined that non-Hodgkin's Lymphoma was caused by exposure to herbicides in the Vietnam Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991).

including Isaacson and Stephenson, had an opportunity to object. After this final transfer of funds, no funds remained for any veteran who would manifest injuries after January 17, 1995. All funds were disbursed by September 1997. (JA at 238-239, 260-261.)

G. The Stephenson/Isaacson Case

Under the laws of their home states, neither Isaacson, a citizen of New Jersey, nor Stephenson, a citizen of Louisiana, could have brought a cancer claim against petitioners until he was actually diagnosed with cancer. Only when they received their devastating diagnoses did Isaacson and Stephenson learn that Agent Orange exposure had been connected to their cancers by the National Academy of Sciences. (JA at 295-299; 319-325.) As a result, Respondents brought state law tort actions against Petitioners, but they were soon met with Petitioners' *res judicata* defense that Respondents' claims had already been settled for no compensation.

Respondents asserted that the class action could not have settled their cases, because they had no justiciable claim at the time of the settlement, they never received notice with a meaningful opportunity to opt out of the *Agent Orange* class, and they had received no representation as part of the class proceedings, much less adequate representation.

Nevertheless, on December 13, 1999, Judge Weinstein granted Petitioners' motion to dismiss their lawsuits. On appeal, the Second Circuit held unanimously that none of the earlier *Agent Orange* decisions had addressed the adequacy of representation for those members of the class whose injuries manifested themselves after 1994.[19] Recognizing that due process requires notice and an opportunity to be heard, the Second Circuit held that Respondents received neither, and that,

19. The panel included one judge who had sat on the Circuit's panel in the *Ivy/Hartman* case (Judge Cardamone).

in the absence of adequate representation, the class action settlement could not preclude their claims.

SUMMARY OF ARGUMENT

Neither due process nor Rule 23 empowers a court to predetermine the preclusive effect of its own judgment on absent class members. This can only take place in the setting of *de novo* collateral review. The right to collateral review is embodied in this court's prior holdings, over sixty years of case law, the very notes to Rule 23, the comments of every contemporaneous commentator on Rule 23, the Restatement of Judgments, and virtually every court that has been asked to review whether a prior class action court has accorded an absent class member with adequate representation or notice. There is no reason for this Court to revisit this well-settled rule.

To determine whether a prior judgment should bind an absent class member, a court is obliged to review whether due process protections were met: whether the class member was in fact adequately represented at all times in the litigation, was given constitutionally sufficient notice, had an opportunity to be heard, and had an opportunity to opt out from a class certified under Rule 23(b)(3). If he did not, then the absent class member was never properly before the court and no judgment can be final as to that absent class member.

Respondents were deprived of **all** of these basic rights during the course of the *Agent Orange* litigation. While a notice pursuant to Rule 23(c)(2) was sent out by the court, this notice gave Respondents no opportunity to opt out of the class, as they could not have known it was addressed to them. As "future" claimants, it is doubtful whether Respondents could ever be given constitutionally required notice. Nor could the Rule 23(e) settlement notice cure the deficiency in failing to give Respondents 23(c)(2) notice. Yet, even this notice failed to apprize Respondents of the most crucial fact they needed to know in order to assess whether to object or appeal the settlement

— exactly what recovery they might expect to receive from the settlement.

The *Agent Orange* judgment further lacked due process because Respondents had no **separate** representation, as required by *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997), and because they had no representation at all when the class was originally certified. When class representatives were subsequently designated, they all had very real present injuries. Their interests were neither aligned with nor could they be aligned with Respondents. The class representatives both wanted (and received) immediate payments for their injuries, while Respondents had no need to settle, particularly for nuisance value or no recovery at all, and could afford to wait for scientific studies in progress to be completed.

Further, though a court's Rule 23(a)(4) determination of adequacy of representation is made early in the litigation and is inherently tentative, "adequate representation" in the constitutional sense must be present at all times. In *Agent Orange*, the class representatives failed to protect Respondents' needs from the day they were appointed through the day the settlement funds were exhausted. Until Respondents were stricken with their deadly cancers, they had no reason to be before any court. And in the absence of due process, they were never properly before any court. In this setting, Petitioners' request to value "finality" over due process rights rings hollow. At the time Petitioners entered into the settlement, they knew Respondents, as "future" claimants, could seek collateral review.

Indeed, Petitioners effectively invited this review by agreeing to "interpret" Respondents into the settlement class after the opt-out period expired. They remained deaf to pleas for separate representation of "futures," while at the same time moving to deplete the last $10 million that could have been used for Respondents' benefit. Under any standard for collateral review, the lack of notice and opportunity to be heard, the complete absence of representation, and the inability to opt out,

it is clear that Petitioners are not entitled to the defense of *res judicata*.

ARGUMENT

I. ABSENTEES MAY ALWAYS RAISE DUE PROCESS OBJECTIONS IN RESPONSE TO THE DEFENSE OF *RES JUDICATA*

This Court has consistently permitted absent class members to contest the adequacy of representation and notice in later actions. In conducting a collateral review in *Hansberry v. Lee*, 311 U.S. 32, 42 (1940), this Court did not seek to prescribe "any particular rule for establishing the conclusiveness of judgments in class suits." Rather, it concluded that the judgment could only stand if "the procedures were so devised **and applied** as to ensure that those present are of the same class as those absent and that the litigation is **so conducted** as to ensure the full and fair consideration of the common issue." *Id.* at 43 (emphasis supplied).

Later, when Rule 23 was amended in 1966, the Advisory Committee explicitly preserved this right of absent class members to contest the validity of a judgment reached in a representative capacity: "[S]ubdivision (c)(3) does not disturb the **recognized principle** that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action." (emphasis supplied). See Restatement Judgment § 86, Comment (H), § 116 (1942).

This right to seek collateral review was unanimously recognized by all of the commentators writing immediately after the Rule was written. Judge Frankel observed:

> There are, of course, some obvious limitations in any case upon the extent to which absent parties will be concluded. * * * such parties have a **clear right** in some later litigation to attack the judgment which purports to bind them. **In such later case, at least the basic consideration going to the fairness of holding them bound will be open for re-examination. Factors which were not brought to the attention of the first court — including most centrally, the adequacy of representation in the first suit, *cf. Hansberry v. Lee* — may lead to a changed perspective**. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 FRD, 39, 46 (1968), (emphasis supplied).

See also 3B Moores Federal Practice, § 23.60 (2d ed. 1987) (same); Wright & Miller § 1789, pp. 246-46 (2d ed. 1986) (same); 3 Newberg on Class Actions (2d ed. 1985) Sec. 16.24 at p. 345.[20]

Petitioners' arguments concerning collateral review of the adequacy of representation also ignore the Restatement of Judgments. The Restatement gives no deference to the original prediction of adequacy, indicating that collateral review is always available for absent class members who are entitled to

20. The Restatement Second of Judgments, § 42(1)(d) Comment A, also recognizes that:

> [A]dequacy of the representation can be established in the action itself only with respect to such represented persons who have the opportunity to be heard on the representation question. As to others, the question of adequacy can be concluded only if and when a person allegedly represented challenges the judgment's effect on him.

have their claims of a denial of due process reviewed *de novo*. § 42(1) holds that "a person is not bound by a judgment for or against the party who purports to represent him if either "(d) * * * there was a substantial diversion of interest" or "(e) the representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent."[21] If "there is in fact a substantial divergence of interest between [the representative and some members of the class] * * * the judgment is not binding on those whose interests are divergent." *Id.*, Comment e.

The structure of Rule 23 also dictates that the initial court's decision on adequacy cannot be immune from challenge. Rule 23 only requires the court to formally consider adequacy once — in deciding whether to certify the class at all — and this is to be done "as soon as practicable after commencement of (the) action". Rule 23(c)(1). A court's determination, under Rule 23(a)(4) is, therefore, not a conclusion, but a prediction. The court merely anticipates that the chosen "representative parties **will** fairly and adequately protect the interest of the class," while adequacy itself must be maintained "at all times." (emphasis supplied). RB at 3.

As Judge Mehrige stated well before the *Agent Orange* case was settled, a district judge cannot be expected to: "foresee *all* the potential claims that *may* be raised by class members in contesting the adequacy of the class representatives and resolve them, perhaps without specifically pointed argument, in a favorable manner." *Lewis v. Philip Morris Inc.*, 419 F. Supp. 345, 352 (E.D. Va. 1976), (emphasis in original), *vacated on other grounds*, *Lewis v. Tobacco Workers' Intern. Union*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979).

21. The reporter's notes to Comment (e) make it clear that under Subsection (d) "the finding of divergence of interest may, *of course*, be made on collateral challenge."

Thus, because due process requires adequate representation "at all times," any single determination of adequacy is inherently tentative. It cannot anticipate whether the representation will be adequate after appeals are exhausted or after the determination of settlement fairness if there are no appeals:

> [T]he determination by the original class action court to the effect that the representative adequately represented the class members, even though it may be clearly correct when it is made, may not be so at later stages of the litigation and a court being asked to bind an absent class member to a judgment, must evaluate the adequacy of the representation not only in terms of the first court's initial inquiry, **but also in light of whether the representation appears adequate after termination of the suit.** *Wright & Miller* § 1789 pp. 251-252 (1986) (emphasis supplied).[22]

This clearly applies to the *Agent Orange* litigation. After appeals were exhausted and the settlement was finalized, the class representatives never sought to adjust the terms of the payments to reflect scientific developments regarding "Agent Orange" disease causation, (RB at 12, and they permitted the ten million dollar reserve fund to be depleted. (RB at 13.) Both of these actions were contrary to the Rule 23(e) settlement notice. (RB at 13.)

Finally, this Court has on several occasions reaffirmed the rule that a class action court cannot control the *res judicata* effect of its own judgment. "[A]n absent class action plaintiff is not required to do anything (such as intervene to contest adequacy of representation before a judgment becomes final).

22. *See also Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir 1973) (requiring a collateral review of the class representative's conduct during the entire suit, even after termination of the original litigation, to see if the representative adequately protected the interests of the class)

He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection". *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985):[23]

After *Shutts*, in *Martin v. Wilks*, 490 U.S. 755 (1989) this Court even held that a person who had notice and an opportunity to be heard in a class action lawsuit is not required to intervene and could seek review of the resultant consent decree collaterally. (*See also* 3B Moores Fed. Practice at § 23.60 pp. 23-444 n.14.) Petitioners, on the other hand, have not identified a single federal appellate court which has completely refused to conduct a collateral review of the binding effect of a Federal Rule 23 judgment on absent class members.

II. RESPONDENTS RECEIVED NEITHER ADEQUATE NOTICE NOR REPRESENTATION, EACH OF WHICH IS A PREDICATE FOR ANY "FINAL" JUDGMENT TO BE VALID

Petitioners concede that Respondents cannot be bound to a judgment obtained without due process of law. Yet in arguing that Respondents do not have a right to a collateral review, that is precisely what they are trying to do here.

23. In *Shutts*, a Kansas state court held both that it had jurisdiction to bind out-of-state absent class members, and that they were adequately represented by the named plaintiff. 472 U.S. at 803-805. After the Kansas Supreme Court affirmed these rulings, Phillips appealed to this Court, still contending that the lower court lacked jurisdiction over out of state absent class members. The plaintiffs argued that Phillips lacked standing to assert the constitutional rights of the absent class members. This Court ruled that even though the issue of jurisdiction was fully litigated in the Kansas court by a class representative that court found to be adequate, the Kansas court's determination of jurisdiction would not preclude collateral attacks by absent class members. They could still sue Phillips in other fora and relitigate the issue of jurisdiction, which is what gave Phillips standing to raise the issue.

A collateral review is the only opportunity for an absent class member to contest whether he was properly before the class court in the first place. The class court could exercise jurisdiction over an absent class member only if he received "notice plus an opportunity to participate in the litigation" as well as "an opportunity to remove himself from the class" and is adequately represented "at all times". *Shutts*, 472 U.S. at 812 n.24. The reviewing court must be allowed to fully evaluate *all four* of these basic rights as they apply to each individual who comes before the court. If Respondents were denied any of these rights, then nothing could be made "final" as to them. *See Bedel v. Thompson*, 1992 U.S. App. LEXIS 3751 at 16 (6th Cir. 1992). In this, case Respondents were denied all four.[24]

A. Respondents Did Not Receive Constitutionally Adequate Notice

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, (1950). In an action under Rule 23(b)(3), notice must also inform the absent class members of their opportunity to opt out. None of the three "notices" given to the Agent Orange class met these constitutional requirements.

1. The March 1984 Rule 23(c)(2) Notice Did Not Provide Respondents With A Full Opportunity To Opt Out.

At minimum, notice cannot bar an absent class member's claims unless it fully informs the class member of the claims

24. The first Question Presented by Petitioners assumes that Respondents had "a full opportunity to opt out, object and appeal," and that the court "expressly determined" that Respondents were adequately represented in the class action. None of these predicates is true.

included in the class action, as well as the right to opt out.[25] Further, notice ". . . must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." *In Re: Nissan Motor Corp. Anti-Trust Litigation*, 552 F.2d 1088, 1105 (5th Cir. 1977).

The Rule 23(c)(2) notice that went out to Vietnam veterans in March 1984 was only addressed to veterans "who were injured." At that time, neither Respondent was "injured" or claimed injury due to Agent Orange. Nor would either Respondent have paid attention to this notice even if Petitioners had intended the notice to reach them. Absent a proper Rule 23(c)(2) notice, Respondents did not have an opportunity to opt out of the Agent Orange class.[26]

25. *See Garcia v. Collins*, 776 F.2d 841, 848 (4th Cir. 1984) (holding that despite a broadly plead complaint, notice was insufficient to state future claims would be barred); *Twigg v. Sears Roebuck and Company*, 153 F.3d 1222, 1227-1230 (11th Cir. 1998) (the language of the notice has to be sufficient to inform the Claimant of the claims asserted) *Penson v. Traveller Transport Company*, 634 F.2d 989 (5th Cir. 1981) (notice did not inform absent class members of the right to opt out) *Republic National Bank of Dallas v. Denson and Addison Company*, 68 F.R.D. 208 (N.D. Texas 1975) (holding that notice should inform absent class members of possible conflicts of interest so that they can decide whether to withdraw from the class.); *Morgan v. Ward*, 699 F. Supp. 1025 (E.D.N.Y. 1988) (class members' individual claim for damages not barred by class action, because he was not notified that membership in a civil rights prisoners' class would foreclose individual actions for damages.).

26. Neither Respondent ever *received* the 23(c)(2) opt out notice, the 23(e) settlement notice, or the subsequent "distribution notice." (JA at 243-44, 290-293.)

2. Even If Respondents Had Received an Adequate Rule 23(c)(2) Notice, It is Doubtful that Notice to "Futures" Can Ever Be Constitutionally Adequate.

Before the Agent Orange settlement, in 1983, a bankruptcy court dealing with future victims of asbestos poisoning held that a representative of future claimants should not be appointed, because notice could not possibly comply with the requirements of due process. *In Re: UNR Industries*, 29 BR 741 (B. ND. Ill.) (1983). While questioning the bankruptcy court, the Court of Appeals stated that giving informed notice to "futures" would be a "formidable, and possibly insurmountable" task. *In re UNR Industries*, 725 F.2d 1111, 1119-20 (7th Cir. 1984).

Because "futures," such as Respondents, have not manifested any injury, it is unlikely that they will pay any attention to a class notice designed to compensate others for injuries they do not share. In *Amchem*, 521 U.S. at 628 this Court recognized that effective notice requires knowledge of one's stake in the outcome:

> Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm that may incur. Even if they fully appreciate the significance of the class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Without an injury, Respondents had no reason either to participate in the litigation, or opt out of it.[27]

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27. Although the court below also recognized the due process concerns inherent in the difficulty of giving such notice, stating, "[w]e also note that plaintiffs likely received inadequate notice," PFC 19a n.8, Petitioners utterly fail to address this issue.

3. The June 1984 Rule 23(e) Settlement Notice Did Not Cure These Defects, As It Neither Provided A Right to Opt Out Nor Did It Inform Respondents Of Their Right To Object To The Adequacy Of Their Representation.

Petitioners insist that Respondents had the opportunity to be heard on adequacy of representation and the sufficiency of notice, because the June 1984 Rule 23(e) notice allowed absent class members to object to the settlement while specifically, albeit inconspicuously, informing them for the first time that the settlement included veterans "who had not yet manifested injury." RB 5. However, notice of the right to object to a settlement does not, by itself, protect other due process rights. *Penson v. Traveller Transport Company*, 634 F.2d 989, 995 (5th Cir. 1981).

The right to object is far more limited than the right to "opt out." In Agent Orange, although the vast majority of veterans appearing at the hearings did "object" to the settlement, Judge Weinsten was free to find them collectively unpersuasive. 597 F. Supp at 761; *see, e.g.*, (JA at 134, 136). RB at 7 n.11. While objecting only allows an absent class member to be heard on inequities in a settlement that has already been negotiated, opting out absolutely preserves an individual's right to trial.[28]

Nor can notice under Rule 23(e) "be read to require absent class members to present objections to the adequacy of

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28. One absent class plaintiff did complain that; 1) there was a conflict in the class between "present" and "future" claimants; 2) those class members who were unaware of injury could not be expected to make informed decisions; and 3) under the laws of many states, the claims of "futures" had not even accrued.(JA at 122-125). His objections were never even addressed in any court decision. Had this highly sophisticated veteran been given an opportunity to opt out, it would have obviated the need for his futile objection. But he never had that opportunity, because he never saw the Rule 23(c)(2) notice, (JA at 124 at n. 3), Petitioners would bind him to the settlement anyway.

representation in a hearing not designed to determine the adequacy of the representation." Patrick Woolley, *The Availability of Collateral Attack For Inadequate Representation in Class Suits*, 79 Texas Law Review, 383, 400 (2000). The Agent Orange Rule 23(e) notice never informed "futures" they could object to the adequacy of their representation nor did it disclose that their representatives had only "present" claims.[29] The notice posed a much different question: "whether this settlement **as a whole** is fair, reasonable and adequate." (JA at 109.) (Emphasis added).

Petitioners were aware that "futures" had not been given a right to opt out and they could have requested a new Rule 23(c)(2) notice. They could also have asked for a Rule 23(d)(2) notice, "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given" so as to allow class "members to signify whether they consider the representation fair and adequate." Petitioners chose neither. Instead, they preferred to bind unrepresented "future" claimants to the settlement with no separate representation or opt out right. RB 5-6.

4. The 1985 Notice Of The Distribution Plan Was So Defective That It Denied Respondents Any Opportunity To Object To or Appeal The Plan.

It was not until the distribution was finalized that "futures" could have known that they would receive less than "present"

29. Indeed, one of the commentators cited by Petitioners' amici wrote that in order to "obtain a high degree of protection against subsequent successful collateral attack in another proceeding" the notice of settlement "should specify that adequacy of representation is an issue in the fairness hearing" and "counsel for all parties should also take pains to establish a record on adequacy in the fairness hearing." Geoffrey P. Miller, "*Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*," 73 N.Y.U. Law, 1167, 1175-76. None of this was done in the original *Agent Orange* litigation.

claimants and, that the fund to pay "settlements" would be fully disbursed by the end of 1994. However, the distribution order announcing this *fait accompli* was directly disseminated only to those who had already made claims, i.e. "present" claimants. Otherwise, it was only transmitted by word of mouth through a number of veterans' organizations and was not reasonably calculated to reach Respondents, who belonged to none of them. (RB 10)[30] Thus, the most critical piece of information that Respondents needed in order to make an informed decision about whether to object to or appeal the settlement — what prospective recovery they might anticipate receiving — was never made available to them, even by publication.

B. Respondents Did Not Receive Adequate Representation

Well before the settlement was ever contemplated in *Agent Orange*, this Court ruled that due process required that there be an identical alignment of interest between any "virtual representatives" and individual absent class members they seek to represent. *Hansberry v. Lee*, 311 U.S. 32 at 45 (1940) Subsequently, Rule 23(a)(4) was amended to strengthen this specific protection for absent class members. However, here it is clear that Respondents did not receive "adequate representation," as it was non-existent at the time of class certification, not aligned with their needs at the time of settlement, and indifferent to their needs throughout the course of the proceedings.

30. This utter lack of notice contrasted sharply with other contemporaneous decisions imposing strict notice requirements. For instance, in the case of persons exposed to DES but not yet injured, the court held that "due process * * * requires *actual* receipt of notice before a judgment may bind class members." *Payton v. Abbott Labs*, 83 F.R.D. 382, 393 (D. Mass. 1979). *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 157 (1974).

1. The Class Certification Did Not Comply With The Requirements of Rule 23(a)(4).

At the time the class was certified, Rule 23(a)(4) was never even applied to class representatives, as no representatives were selected either at the time of Judge Pratt's provisional certification or at the time Judge Weinstein's class certification. RB 2-3. Both judges stated only that adequacy of representation was "speculative," because it was being "made at the time of a class certification when the facts have not been fully developed." 100 F.R.D. at 726. Clearly without any representation at all, Petitioners cannot state that Respondents were "adequately represented." According to Petitioners' own analysis. The failure to evaluate class representatives *before* granting class certification renders the *Agent Orange* class suspect (PB at 27-29).

2. Even After Class Representatives Were Appointed, There Was No Alignment Between The "Present" Class Representatives and the "Futures" They Sought to Represent.

Before the *Agent Orange* settlement occurred, a variety of courts, in different contexts, held that any attempts by "present" claimants to represent "future" claimants raised due process concerns.

In cases involving certification or settlement approval of classes consisting of present and future victims of discrimination, the reviewing courts generally held that future claimants had nothing to gain and everything to lose by being subjected to the binding effect of a judgment when their a cause of action had yet to accrue. *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624 (1981) (W.D. Arkansas) (holding that allowing

present employees to represent future employees would violate due process considerations).[31]

In the bankruptcy arena when attempts were made to regulate the claims of potential "futures", courts consistently required separate representation. *In Re: Amatex Corporation*, 755 F.2d 1034, 1042-1043 (3d Cir. 1984) ("future claimants require their own spokesperson" because other parties involved in the proceeding had different interests."); *In Re: Johns Manville*, 36 B.R. 743 (Bkcy. S.D.N.Y. 1984), (holding that attorneys for claimants who had present claims had a "stake in maximizing recovery from the reorganizing Manville [which] may be antithetical to the expectations of future interests" in that **"such representation indeed has the potential for being inadequate given this conflict of interest problem."** The court concluded that "an independent representative for future claimants is essential.") (36 BR at 749.)[32]

Finally, in other mass tort class actions in the 1980's, courts recognized the clear conflict which existed between present and "future" claimants. For instance, in *In Re: Bendectin Products Liability Litigation*, 749 F.2d 300, 304 n.8 (6th Cir. 1984) when a class including "futures" was certified, the Court of Appeals granted a writ of mandamus to vacate the certification, stating that the same counsel could not represent both present and future

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31. *See Scott v. University of Delaware*, 601 F.2d 76, 89 (3d Cir.), *cert. denied*, by *Estate of Scott*, 444 U.S. 931 (1979); *Freeman v. Motor Convey, Inc.*, 68 F.R.D. 196, 200 (N.D. Georgia 1974); *Moore v. Western Pennsylvania Water Company*, 73 F.R.D. 415, 453 (W.D. Pa. 1977).

32. The *Johns Manville* opinion was affirmed at 52 BR 940, 943 (1985), again with the understanding it would not attempt to discharge the claims of future claimants. It was reaffirmed in *Kane v. Johns Manville Corp.*, 843 F.2d 636 (2d Cir. 1988), holding that Kane, a present claimant, lacked standing to assert the future claimants' due process rights to adequate notice, because his interests were actually in conflict with the futures. *Id.* at 643-644.

claimants because both groups "are inherently in conflict with each other for their share of the settlement" and the present subclass "had the incentive to try to minimize the size of the [future subclass] in order to increase [their] share of the settlement."[33]

This Court in *Amchem*, 521 U.S. at 626-27 then followed settled law in addressing the inherent conflicts between present and future claimants:[34]

> In significant respects, the interest of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring ample, inflation-protected fund for the future.

33. *See also Payton v. Abbott Laboratories*, 100 F.R.D. 336, 338 (D. Mass. 1983) decertifying a class which included future claimants because their claims were not yet cognizable.

34. Petitioners' Second Question erroneously assumes that *Amchem* established new law. Arguably, under *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (Scalia, J., concurring in judgment (1991)), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 548-54 (1991), the Court cannot "make" new law at all, but rather "finds" the law as it has always existed. Under that view, it is impossible that "new law" was applied here. Even under the now discredited non-retroactivity rule of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *Amchem* or *Ortiz* did not announce a new rule. A rule cannot be "new" unless it "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, (citation omitted), or by deciding an issue of first impression whose resolution was not clearly foreshadowed. (citation omitted)." *Chevron* at 106. Petitioners point to no cases that *Amchem* overruled, and do not explain how the class judgment relied on earlier cases compelling a contrary result. *Amchem* and *Ortiz* "are not exactly novelties." *Crawford v. Equifax Payment Services*, 201 F.3d 877, 882 (7th Cir. 2000) (Easterbrook, J.). They apply the terms of Rule 23, and thus the principle of law on which they rest — merely that federal courts must follow the Federal Rules of Civil Procedure — hardly a novel concept.

Amchem, 521 U.S. at 626. This Court therefore concluded that a class action settlement could not bind absent class members unless each of the subgroups with divergent interests — most notably present claimants versus future claimants — was represented by members of that distinct subgroup who would protect the interests of that subgroup only:

> The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup **cannot be bound to a settlement** except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

Id. (citations omitted) (emphasis added). Under *Amchem*, a settlement on behalf of both currently-injured and exposure-only plaintiffs reached by currently-injured plaintiffs **cannot** be binding on persons who at the time of settlement had not yet manifested injury.[35]

This holding, which expressly followed the intent of the framers of Federal Rule 23, as amended in 1966, was reaffirmed by this court in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999):

> [I]t is obvious that a class divided between holders of present and future claims (some of the latter involving no physical injury . . .) requires division into homogeneous subclasses under Rule 23(c)(4)(b), with separate representation to eliminate conflicting interests of counsel.

Id. at 854-56.[36]

35. Indeed, unlike *Agent Orange*, the class representatives in both *Amchem* and *Ortiz* included "futures." *Amchem*, *supra* at 603; *Ahearn v. Fibreboard* 1995 US Dist Lexis 11532 at *195 (E.D. Tex), *aff'd sub nom, in re Asbestos Litigation*, 90 F.3d 963, *reversed*, *Ortiz*, *supra*.

36. Petitioners argue that *Amchem* and *Ortiz* were decided under Rule 23(a)(4) and not the Due Process clause. This ignores the fact that (Cont'd)

Thus, when class representatives were finally selected in the *Agent Orange* litigation, their interests had to be aligned with "future" plaintiffs. Because all of the class representatives had very significant present injuries (RB at 3-4) their interests were clearly not aligned with the interests the interests of Respondents. (RB at 5-6, 8-10.)

The class representatives had no choice but to pursue their present injury cases, while Respondents had time for scientific studies evaluating causation to mature. Settling particularly benefitted the many "present" claimants whose claims had statutes of limitations problems. *In Re Agent Orange*, 597 F. Supp. at 800-816. Respondents had no such concerns. The class representatives also had an incentive to settle, even for "nuisance" value, because their illnesses caused very real financial pressures, including the present costs of treatment, while Respondents did not share these financial pressures.

To be sure, Petitioners and their *amici* attempt to escape this clear mandate of *Amchem* on the grounds that the class in *Amchem* was a settlement-only class, whereas the *Agent Orange* class was first certified for litigation. However, in *Amchem*, this Court expressly noted that the Rule 23(a)(4) prerequisite of adequacy of representation is the same for a settlement class as it is for a litigation class. *See* 521 U.S. at 620-621. Moreover, "future" claimants may need even more protection in a litigation class than a settlement class, given that costs incurred in preparing for trial are substantial, and the incentive to recoup

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Rule 23(a)(4) exists to protect due process rights. Petitioners do not, and cannot, explain how a judgment obtained against an absentee who was not adequately represented complies with due process of law.

those costs can unduly influence settlements, as the Second Circuit found here. RB 11.[37]

3. The Representation Provided By The Class Representatives Was Inadequate From the Day That They Were Appointed To The Day Funds Were Disbursed.

Courts have a duty to thoroughly and scrupulously examine the actions of class representatives at every stage of the proceeding in order to make sure they provide adequate representation for absent class members. *See Guerine v. J&W Investment Company*, 544 F.2d 863 (5th Cir. 1977). Thus, adequacy of representation is not only determined at the time of class certification, but at every other stage, including discovery, the pre-trial stage, and trial, *see Johnson v. Shreveport Garment Company*, 422 F. Supp. 526 (W.D. LA 1976)); post trial modifications of court orders, *Crawford v. Honig*, 37 F.3d 485, 488 (9th Cir 1994) the award of attorneys fees *National Association of Regional Medical Program, Inc. v. Matthews*, 551 F.2d 340 (D.C. Cir. 1976) and the failure to appeal *Gonzalez v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). In sum, as this Court has stated, due process requires adequate representation "at all times." *Shutts*, 472 U.S. at 812 (1985).

However, the *Agent Orange* class representatives repeatedly failed to provide Respondents with adequate representation: 1) their attorneys certified a class without appointing any class representatives; 2) the representatives entered into a settlement

37. Petitioners turn the arguments made by the proponents of *Amchem* on their head. In *Amchem* the proponents of the settlement argued that the Rule 23(a) requirements should be *less* stringent given the circumstance of a settlement class rather than *more* stringent as Petitioners' brief herein avers. This Court in *Amchem* followed the Third Circuit by stating that there was no basis to distinguish a "settlement only class" for special *less stringent* treatment regarding Rule 23(a) and (b) issues, including adequacy of representation.

knowing that the definition of the settling class given 23(c)(2) notice was being "interpreted" to include persons, such as Respondents, who were not reasonably a part of that class, 3) they failed to insist that a class representative who had not yet manifested injury be appointed to represent the "futures," such as Respondents, 4) they agreed to settle Respondents' "future" claims for "nuisance" value or less, knowing that scientific studies were ongoing and that "futures" had no urgency to settle; 5) they failed to object to the fact that compensation for all veterans would be allowed to terminate in 1994, despite specific contrary representations made in the Rule 23(e) settlement notice; and 6) they agreed to a compensation scheme which was skewed towards increased payments for "present" claimants. (RB 5-10).

After final approval of the settlement, the class representatives continued to ignore Respondents' interests. They failed to monitor the ongoing science and request that payments be adjusted to compensate injuries which bore a scientific relationship to Agent Orange, as had been promised in the 23(e) notice. They failed to object when the ten million dollar fund was depleted without regard to the needs of veterans who would manifest injuries after 1994[38]. Far from adequately representing Respondents "at all times," "present" class representatives did not represent Respondents at **any** time, as is demonstrated by the result they obtained for Respondents.

38. *See Crawford v. Honig*, 37 F.3d 485, 488 (9th Cir. 1994), holding that because absent class members were not adequately represented in a post-settlement modification of a class-wide injunction, *res judicata* did not bar them from collaterally attacking the proceedings.

III. RELEASING UNACCRUED "FUTURE" CLAIMS WITHOUT SEPARATE REPRESENTATION VIOLATED ARTICLE III OF THE U.S. CONSTITUTION, AND DEPRIVED RESPONDENTS OF STATE LAW RIGHTS UNDER THE GUISE OF RULE 23 PROCEDURES

Under the Rules Enabling Act, a Federal Rule may not "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). Rule 23 does not change the substantive law of *res judicata*, which only precludes claims that were litigated or could have been litigated in the prior action. *Heiser v. Woodruff*, 327 U.S. 726, 735 (1946).

The cancer claims of Respondents could not have been individually litigated in the prior *Agent Orange* case, which sat pursuant to diversity jurisdiction on assignment from the MDL panel, because Respondents' claims had yet to accrue.[39] *Ayers v. Jackson Township*, 106 N.J. 557, 583, 561 A.2d 287, 300 (1987) (holding in New Jersey that claim preclusion cannot apply, because the claim could not have been joined with earlier claims, such as property damage; or medical monitoring, as it did not accrue until the disease manifested.) *Breaux v. Mine Safety Appliances Co.*, 717 So.2d 1255 (La. App. 5th Cir. 1998) (holding in Louisiana that an asbestos victim who had released his exposure claim was not barred from pursuing a claim for mesothelioma resulting from the same exposure which manifested itself 16 years after the prior settlement). *Cole v. Celotex*, 599 So.2d 1058, 1086 (La. 1992) (Dennis J. concurring).

These rules are for the benefit of both the tortfeasor and the victim; the tortfeasor is spared lawsuits for damage that may never occur, while the victim is protected because "to award

39. *See also Schweitzer v. Conrail*, 758 F.2d 936 (3d Cir. 1985) where the court held that unmanifested injury claims of persons exposed to asbestos could not even be litigated in bankruptcy, because the claims had yet to accrue.

damages based on a mathematical probability would significantly undercompensate those who actually do develop cancer." *Ayers*, *supra*, 561 A.2d at 300.

Moreover, while neither of Respondents' claims presented a "case" or "controversy" in 1984, had either of their individual cases been reduced to judgment in favor of the Petitioners, that judgment would still not have barred Respondents' claims for cancer first diagnosed after the judgment. *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18 (2d Cir. 1981) (Friendly, J.) If a judgment after a trial still cannot extinguish these state law claims, neither should a judgment approving a settlement that has been entered in a representative capacity. *Id.* This is especially so when the class representatives themselves have not asserted the claims which they are agreeing to extinguish. *Id.*

IV. PETITIONERS' EQUITABLE ARGUMENTS AND SUGGESTED ALTERNATIVE STANDARDS FOR COLLATERAL REVIEW HAVE NO BASIS IN BINDING CASE LAW OR THE CONSTITUTION ITSELF, BUT EVEN UNDER THEIR PROPOSED STANDARDS THE DECISION OF THE COURT BELOW SHOULD BE AFFIRMED, AS THE BALANCE OF EQUITIES RESIDES WITH RESPONDENTS

1. Applying Petitioner's Proposed "Procedural" Test Developed From *Epstein III*, While Inconsistent With Due Process, Would Still Require the Judgment to Be affirmed.

While ignoring all of the cases which have permitted full collateral review, Petitioners base their argument for a limited review on one Circuit Court case, *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999). *Epstein* involved a challenge to a Delaware state court securities class action., Pursuant to the Full Faith and Credit Statute, 28 U.S.C. § 1738, the divided *Epstein* court looked to Delaware law which, the court held,

provided no right for absent class members to seek collateral review of the validity of a settlement so long as the certifying court determined that the criteria of adequacy of representation had been met. 179 F.3d 647 at n.6. The *Epstein* court found that "limited collateral review" was appropriate "to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a full and fair opportunity to litigate the claim or issue."[40] *Id.* at 648-9. Significantly, this "*Epstein* test," developed by Judge O'Scannlain, has never been applied to any other federal court class action judgment, including in its own circuit. *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 852-53 (9th Cir. 2000) (O'Scannlain, J. dissenting).[41]

Nevertheless, even under the logic of *Epstein III*, the Agent Orange judgment cannot stand. The procedures in Agent Orange were not only deficient, but often nonexistent. Rule 23(a)(4) was not complied with, as adequacy of representation was not truly determined at the time of class certification given that there were no "representatives" who were determined to be adequate. Rule 23(c)(2) was not complied with, as no notice was ever directed to Respondents who were not "injured."[42]

40. The **only** academicians whom Petitioners assert to be in favor of their proposition, Professors Kahan and Silberman, would similarly allow a limited collateral review to determine whether the process used to determine adequacy of representation and sufficiency of notice in the original forum was so flawed as to violate due process of law. Kahan and Silverman, "*The Inadequate Search for Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. Law Review, 765, 788-89.

41. *See also Brown v. Ticor Title Insurance Company*, 982 F2d 386, 390-91 (9th Cir 1992). *cert dismissed*, 511 U.S. 117 (1994) (allowing collateral review, employing test of Restatement (Second) Judgments Sec. 42(1)(2)). *Supra* pp. 18-19.

42. Unlike the *Epstein* court, the Second Circuit was not only reviewing a Federal court judgment, it was reviewing its own approval

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All of the equitable considerations which might have compelled the *Epstein* court to create a novel standard for collateral review were absent in the *Agent Orange* litigation. While the *Epstein* dissidents had every possible opportunity to opt out of the Delaware settlement, object to its terms, or pursue a direct appeal of the Delaware state court's approval of the settlement, "future" claimants, such as Respondents "are, by definition, persons who have not developed a sufficient interest in their claims to file suit; thus, they are likely to be passive and particularly vulnerable to exploitation." *Flanagan v. Ahearn*, 90 F.3d 963,1000 (5th Cir. 1996) (Smith, J. dissenting), *judgment rev'd*, *Ortiz*, 527 U.S. at 594-95. Further, the *Epstein* dissidents at the time of the settlement had counsel who was fully cognizant of the Delaware proceedings but made a strategic decision not to object in order to seek review in another forum. *Matsushita Elec. Indus. Co. v. Epstein* oral argument No. 94-1809, 1995 U.S. Trans Lexis 108 at 43, Respondents, with neither injuries nor damages, had no reason to even consider obtaining counsel.[43]

2. Petitioners Use Doctrines Developed in *Mathews* and the *Habeas Corpus* Setting to Construct Tests Which Are Utterly Inappropriate For Judgments Rendered Against Absent Class Members, Yet Even Under Those Tests The Court Below Should be Affirmed.

Petitioners assert that a court considering a res judicata review should begin with an analysis of whether the "benefit" to Respondents of due process "safeguard[s] is substantially

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of a judgment. Therefore, it could authoritatively state that it had not previously considered the issue of adequacy for post-1994 Agent Orange claimants and also reconcile its decision with *Epstein*. (PFC at 14a and n.6)

43. Future claim class actions present the extreme example of lawyers operating without clients." J. Coffee, "*Class Wars, The Dilemma of the Mass Tort Class Action*," 95 Colum. L. Rev. 1343, 1432 (1995).

outweighed by the cost of providing such protection." (PB at 41). Using a strained construction of this court's analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and the procedures developed in *habeas corpus* proceedings, Petitioners then propose that this court develop an entirely new balancing test to assess whether a collateral review should be undertaken: "class members must demonstrate both the conflict caused them *actual* prejudice and the contravening reliance interests in the judgments on the part of the other affected parties are minimal." (PB at 44).

However, even under the heavily unbalanced test that Petitioners have designed, Petitioners would still not succeed. The actual prejudice to Respondents is obvious. Respondents had no reason to liquidate their claims for life-threatening illnesses for nothing, or even "nuisance value." They had every reason to wait to see if they developed an Agent Orange related disease before they brought a claim. They had every right and wish to have the merits of their cases judged on the state of scientific knowledge at the time their claims accrued. *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 630-31, *aff'd sub. nom*, *Amchem Prods. Inc. v. Windsor, supra*.

Looking at the effect on the "parties" prong of Petitioners' balancing test, class representatives cannot be affected by anything this Court decides. The "present" claimants and the class representatives were paid for their injuries long ago.

This leaves Petitioners as the only other "parties" to their own test. They argue prejudice solely based on the fact that they have already paid a sum of money into a settlement fund and were then free to discharge all of their responsibilities to the class. They argue this prejudice, asserting that they are prejudiced unless this court wholeheartedly approves their reliance on a settlement in which they resolved 2.4 million "putative" claims (not including spouses and children) for an average of 75 dollars per claim.

Petitioners were not innocent bystanders to the lack of due process accorded Respondents. They were participants. Petitioners were not only aware of the conflicts between the class representatives and future claimants; they *created them* by insisting that the settlement class be expanded to include futures when they had previously insisted that the claims of futures were not justiciable. (RB at 2 n.3, 5 n.8). They knew that the original notice was insufficient to inform futures that they would be included in the settlement. They saw to it that no new notice and opt out period were given. They were aware of requests for separate representation for future claimants but neither joined in those requests nor supported them in any way. Petitioners knew the payment program failed to adjust for scientific developments regarding causation, despite the 23(e) notice which went out, and it was Petitioners themselves who moved to deplete the $10 million reserve fund, ignoring the interests of post-1994 "futures," including Respondents.

In any case, nothing in the history, structure or extensive judicial interpretation of Rule 23 and due process includes a requirement that the contravening reliance interests in a judgment on the part of other affected parties must be "minimal." Petitioners' suggested test must be rejected because it:

> is simply a variation of the position put forward by the proponents in *Amchem*, who tried to discount comparable failure in that case to provide separate representatives for subclasses with conflicting interests. . . . "Nor does it answer the settlement's failures to provide structural protections in the service of equity to argue that the certified class members' common interest . . . was so weighty as to diminish the deficiencies beneath recognition here. * * * (citing, e.g. ***In re "Agent Orange" Product Liability Litigation***. . . .) . . . The current

> position is just as unavailing as its predecessor in *Amchem*. There we gave the argument no weight, see 521 U.S. at 625-628, observing that "the benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration," * * * Here, just as in the earlier case, the proponents of the settlement are trying to rewrite Rule 23; each ignores the fact that Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity . . ."

Ortiz, *supra* at 858 (emphasis supplied).

In fact, the countervailing policy concerns upholding this settlement are far less weighty than they were in either *Amchem* or *Ortiz*. In those cases, there was a serious concern that a global solution was needed to assure funds would be available for future claimants. *Amchem*, *supra*, at 637-38 (Breyer, J. dissenting) (noting that the trial court expressly found no conflicts, and that futures were adequately protected); *Ortiz*, *supra*, at 878-881 (Breyer J. dissenting) (same). The *Agent Orange* court never found that the risk of depletion of Petitioners' assets justified an abridgment of their future rights. To the contrary, the district court expressly found that Petitioners had sufficient funds to pay any prospective claims. 597 F Supp at 761.

Finally, the legal bases upon which Petitioners assert their balancing tests have fundamental flaws when applied to absent class members. *Mathews v. Eldridge*, simply doesn't come into play when a court lacks jurisdiction. When an absent class member does not receive adequate representation or clear notice with a right to opt out the settling court has no jurisdiction over the claimant in the first place.[44] *Shutts*, *supra*.

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44. This also disposes of the argument that a collateral review should be given no greater scrutiny than the "abuse of discretion" (Cont'd)

Furthermore, although Petitioners and their *amici* argue at length that Respondents have no constitutional right to collateral review under their permutation of *Mathews*, there is no need to even reach the constitutional issue. Rule 23 plainly authorizes collateral review. (RB at 17-20.)

Petitioners' comparisons to *habeas corpus* proceedings are equally unavailing. In *habeas*, the accused has already been personally before the court in the underlying proceedings. "Adequacy of representation" is firmly embedded in *habeas corpus* review. Justice Harlan stated that the right to counsel in a criminal trial was the kind of "bedrock procedural element" which must be applied retroactively in *habeas* proceedings if this Court is to be faithful to the fundamental principles in the Bill of Rights. *Mackey v. United States*, 401 U.S. 667, 693-694 (1971) (Harlan J. concurring), citing *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963); Harlan, J., concurring.[45]

3. Petitioners' Request For "Finality" In the Face Of Due Process Violations Was Long Ago Rejected By This Court.

Petitioners had no "due process" right to expect "finality" simply because they paid a settlement to a class. Petitioners knew that in 1984 there were serious questions as to whether personal injury class actions could be used to settle "future" claims on behalf of an entire class, just as they knew that "future"

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standard on direct appeal. An appeal assumes that the party appealing was previously heard in the lower court. An absent class member seeking collateral review argues that the court lacked jurisdiction which is reviewed *de novo*.

45. Respondents were far more helpless in this case than Clarence Earl Gideon was in trying to represent himself against a seasoned prosecutor in a Florida courtroom. Gideon made an opening statement to the jury, presented witnesses in his own defense, cross examined the state's witnesses and made a closing argument. 372 U.S. at 337.

claimants likely didn't even have a cause of action. (RB at n.3) Furthermore, a quick review of any first year casebook on civil procedure in 1984 would have apprized them that absent class members were entitled to *de novo* collateral review of notice and adequacy of representation. As has been observed:

> [I]t is probably impossible to guarantee prospectively the conclusive effect of a class suit judgment. However, that is not really a serious objection to the class suit procedure * * * A litigant always remains free to say there was no actual service of process or that due process was invalid in some respect or that the proceeding was invalidated by fraud, and so on. G. Hazard, J. Gedid and S. Sowle, *Historical Analysis of the Binding effect of Class Suits*, 146 U of Pa. L. Rev. 1849, 1946 (1998).

That the desired goal of finality does not permit representatives with present interests to abridge the due process rights of "futures" was first decided by this Court well over a century ago. In *McArthur v. Scott*, 113 U.S. 343 (1885), the question was whether present claimants could bind future, unborn heirs through "virtual representation".[46] The present

46. In *McArthur*, *supra*, McArthur left a will that gave income from certain land to his children for their lives and directed that, when the children had all died and the last grandchild had reached the age of 21, the properties were to be distributed to his grandchildren. All of the sons contested the will and named all the other living heirs in that suit, including parents of several grandchildren to act as *guardians ad litem* for the latter. None of the defendants contested the allegations, and the will was found invalid. The property was distributed to the children and portions of the property were sold off to *bona fide* purchasers. After thirty years passed and the youngest grandchild reached the age of 21, some of the grandchildren filed suit against the other grandchildren and the transferees of the property claiming the will was valid and the title of the property should be returned to them. The Court ruled in their favor, holding that the interests of those grandchildren
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claimants, who were successful in the original action, relied upon that success in distributing and selling the property in question. *Id.* at 392. Notwithstanding immensely important judicial policies favoring finality in real estate transactions, this Court held that the judgment was not binding on the grandchildren when they brought suit thirty years later:

> To extend the doctrine of constructive and virtual representation, adopted by courts of equity on considerations of sound policy and practical necessity, to a decree like this, in which it is apparent that there was no real representation of the interests of these plaintiffs, would be to confess that the court is powerless to do justice to suitors who have never before had a hearing. *Id.* at 404.

To protect the absent class members who had no representation, the Court held that the post-judgment partition of the land among the heirs at law, and their conveyances to third persons for valuable consideration, could not affect the title of the grandchildren, who were allowed to retake the properties over the claims of subsequent purchasers.

Similarly, in *Hansberry*, this court reiterated the principle that finality of judgments, no matter how desirable, must be subordinate to due process of law, and reversed the Supreme Court of Illinois, which had valued finality more highly. (*See Lee v. Hansberry*, 372 Ill. 369, 24 N.E.2d 37, 39 (1939)).

While Petitioners may desire that this Court defer to their reliance interest in the judgment, such deference must fail before the law authorizing de novo collateral review and the fact that Respondents have no other means of review.

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were not adequately represented in the first proceeding, because the heirs who were joined in the action, did not have an interest in upholding the will.

4. Petitioners' Fears For The Legal System Are More Imagined Than Real; The Real Catastrophe Would Be If Collateral Review, An Essential Element in the Array of Due Process Protections For Absent Class Members, Is Limited.

Petitioners and their *amici* cite a parade of horrors which will be visited upon the nation's judicial system should Respondents prevail. Yet, they present no evidence that this has occurred in the past nor any likelihood that it will occur in the future., "[C]ollateral attack has been used relatively sparingly to attack the adequacy of representation." Mollie Murphy, "*The Intersystem Class Settlement; of Comity, Consent and Collision*," 47 U. Kan. L. Rev. #13, 469 (1999). One commentator reported that his research revealed only 44 federal and state cases since the 1966 amendments to Rule 23 in which absent class members collaterally attacked a judgment based on inadequate representation. Woolley, *supra* at 443, n. 268.

Moreover, no one with knowledge of a significant stake in the outcome of litigation would likely sit back and refuse to opt out or object, just to seek collateral review. Opting out is simple. Even objectors in fairness hearings can challenge the fairness and adequacy of a settlement, whereas collateral attacks are narrow in scope and more costly to bring, requiring attorneys to engage in extensive litigation of *res judicata* questions before even getting to the merits of a case. G. Miller, *Full Faith and Credit to settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. Rev. 1167, 1185; *Woolley*, *supra*, at 444. In this case, for example, it has been approximately four years since Respondents brought their cases and they still have not learned whether they can even proceed.

Despite this, Petitioners state that Respondents, as absent class members who subsequently became "dissatisfied" with their settlement, should not be permitted to "second guess"

a finding of adequacy. (PB at 22) However, Respondents, as "futures," could not even make a "first guess" at the time of the settlement.

Indeed, at the time of the settlement, when presently injured objectors attempted to assert objections on behalf of "future" claimants, Respondents, despite knowing that "future" class members had neither received notice nor adequate representation, never tried to remedy the infirmities in the settlement but instead proceeded to argue to the Court that the parties raising the complaints had no standing to raise these complaints on behalf of "futures:" "Appellants fail to show any violation of their own rights, but instead focus on **conjectural abridgments** of the rights of **phantom class members** who they concede **are unknown and have manifested no injury** related to the allegations in this litigation." March 10, 1986 "Brief for Defendants-Appellees" submitted to the Second Circuit in response to the appeal of the Settlement at p. 18 (emphasis supplied). Thus, while Petitioners now argue that Respondents cannot collaterally "second guess" the settlement, they argued at the time of the original litigation that any such "guessing" would be both conjectural and not worthy of the court's consideration. Petitioners cannot have it both ways.

Moreover, if as Petitioners contend, this Court were to decide that "futures" may not seek a collateral review of the adequacy of representation, then the holdings of *Amchem* and *Ortiz* will be rendered meaningless. A court could approve a class action settlement in violation of *Amchem*, which "future" claimants, having no vested interest in, would be unlikely to challenge, especially while facing significant transaction costs in a distant court. These unchallenged, erroneous findings of adequacy and notice would then be binding on all "future" claimants, so long as the settlement court adhered to the

formalities of providing hearings and giving notice,[47] even if potential objectors were bought out and no class member appealed.

The likelihood for abuse under this scenario is overwhelming. Victims of devastating diseases would lose all rights to compensation without receiving any **effective** notice or representation as the result of actions occurring in distant courts years before their claims ever accrued. Their claims would be pre-empted by the legislative-like establishment of useless "term insurance policies," while they would be required to rely upon random class members to present any objections they might have had.

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47. According to Petitioners' logic (PB at 35, n.10) a court would be immune from collateral review even it it had failed to provide adequate notice so long as it made an affirmative finding, erroneous though it may be, that the notice given was adequate.

CONCLUSION

Petitioners have bought 19 years of peace for "nuisance" value, while Respondents, diagnosed with cancer between five and seven years ago, have yet to have their day in court. Respondents have waited long enough. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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